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## Milford Opportunities Project: Masterplanning to realise an ambitious vision



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THE ASSOCIATION FOR RESOURCE MANAGEMENT PRACTITIONERS

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## EDITORIAL

Bronwyn Carruthers, Barrister, Shortland Chambers

Milford Sound Piotahitahi is one of the oldest and leading tourism experiences in New Zealand. The recent Opportunities Masterplan has explored how to achieve transformational change towards regenerative tourism. Our lead article from key players in the preparation of the masterplan explain the project, the process and the aspiration to create a world-class journey experience within the Te Anau basin, the corridor and the area of the Sound itself.

Our second article identifies the similarities and differences between the alternatives' assessment required for some projects under the RMA and the equivalent assessment as part of the business case evaluation. It identifies how the selection of criteria are critical if the assessment is to be fit for purpose under both processes. It provides guidance on how to appropriately focus the criteria, principles to consider when designing the process and key steps to reduce the risk of the outcome not being fit for purpose.

The "avoid" directive of the NZCPS has yet again been before the Court of Appeal. In *Port Otago Ltd v EDS*, the Court was considering whether a specific port policy in the Otago RPS could provide for port activities to avoid, remedy or mitigate effects in areas of outstanding natural character. The decision is a notable addition to the *King Salmon* line of cases, for the reasons clearly set out by Ezekiel Hudspith and Louise Espin in their case summary. The decision (and their analysis) is timely as we grapple with the proposed NBEA and its associated National Planning Framework and seek to avoid repeating the current "regulatory mismatch".

The regulatory implications of the Government's announcement in relation to the ongoing use of Overseer are also exercising the minds of many this year. Lucy de Latour provides an overview of the findings of the Scientific Advisory Panel's report in June 2021 and the Government's response in August 2021. She then explains what this means when applying for and processing applications under the existing planning frameworks that rely on Overseer and identifies some of the options moving forward.

The practical implications of the definition of "wetland" in the RMA, the definition of "inland natural wetland" in the NPS Freshwater Management and the use of the term "natural wetland" in the NES on Freshwater using the definition from the NPS Freshwater Management are

considered in the case summary from Olivia Manning and Rebekah Hill.

Rounding out this Edition is the analysis of two recent High Court decisions under the Marine and Coastal Area (Takutai Moana) Act 2011 addressing some of the critical questions central to many of the almost 200 claims setting a clear pathway for the other applicants to follow.







## Alternatives Assessment under the RMA & Business Case Processes

### INTRODUCTION

Assessing alternative ways to resolve problems, take advantage of opportunities and fulfil objectives should be a key step in any significant planning process. Under the Resource Management Act 1991 (RMA), an “alternatives assessment” is required:

- When seeking resource consent for projects with the potential to have significant adverse effects, where the application is for a discharge permit or a coastal permit, and/or where a “Best Practicable Option” approach is proposed.
- When seeking a Notice of Requirement (NOR), if the requiring authority has an insufficient interest in the land and/or it is likely that the work will have significant adverse effects on the environment.

In addition, directive environmental protection policy requirements, the use of effects management hierarchies and giving effect to Te Mana o Te Wai, are expanding the need for detailed and carefully managed alternative assessment processes.

Increasingly, many projects advanced under the RMA are also subject to business case evaluations intended to ensure robust investment decision-making. The business case process also requires the assessment of alternatives to ensure that the proposed investment will address the identified problems, represent value for money, and be implemented efficiently.

This paper compares the drivers for alternatives assessment under the RMA and the business case process. It provides recommendations to help ensure that alternatives assessment can efficiently and effectively meet the



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requirements of both.

### “ALTERNATIVES” VS “OPTIONS”

First, let us discuss terminology. In the RMA, the term “alternatives” is used in some sections and “options” in others. Typically for business case processes, the term “alternatives” refers to strategic alternatives, e.g., road vs rail. The term “options” is used once the strategic alternative

is chosen, e.g., route alignments. In this article, the terms alternatives and options are used interchangeably.

### RMA REQUIREMENTS

The Final Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project (NIGUP) (4 September 2009 at [177]) provides key direction regarding the consideration of alternatives under the RMA. This decision has been adopted in subsequent Court decisions, including by the High Court in *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 and, in *NZ Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 (Basin Bridge) (upholding the Board of Inquiry’s reliance on the NIGUP decision). It has also been applied in numerous Environment Court cases including *The Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203.

These various decisions emphasise that the focus should be on the adequacy of the assessment process rather than the outcome. The selection of an option must not be based on a cursory or arbitrary process but one that is robust, definable, transparent and repeatable. However, the consideration of alternatives does not need to be exhaustive, i.e., not every viable option needs to be considered. In this respect, the role of the decision-maker is to determine the adequacy of the assessment, not to put itself in the place of the applicant or requiring authority and select the best option.

The decisions also emphasise that the detail of the assessment should be proportional to the potential adverse effects of the activities being considered and the sensitivity of the environment(s) potentially impacted. In other words, for projects with the potential for more significant adverse effects (or a greater impact on private land), a more detailed and robust assessment of alternatives is required. The assessment process should integrate RMA matters, particularly relevant pt 2 matters. Where these matters are of particular relevance to a proposal, they should be given prominence in the alternatives assessment process, e.g., through specific criteria and/or criteria weighting.

Ensuring that RMA matters are integral to assessing alternatives is particularly important where relevant resource management policy statements and plans establish high regulatory “hurdles”. Provisions establishing effects management hierarchies are increasingly common

in resource management policy statements and plans. These provisions often require that activities in the first instance seek to avoid certain areas or adverse effects on specific values. Where effects management hierarchies are relevant and are strongly worded, the alternatives assessment process should be designed to reflect this. This could be achieved by staging the options’ assessment so that options that would avoid adverse effects on the specified values are considered first. Alternatively, suppose only discrete elements of options fall under the effects management hierarchy. In that case, these elements could be considered as a further stage in the alternatives assessment process after selecting a preferred option, i.e., assess whether there are alternatives to those elements that do not align with the effects management hierarchy.

In a similar fashion where a project may impact freshwater, Te Mana o te Wai may need to be reflected in the alternatives assessment method. This could also require a staged assessment of options and/or criteria weighting that aligns with the hierarchy of obligations under Te Mana o te Wai.

Engagement with tangata whenua and stakeholders is critical to understanding the available alternatives and their effects. Alternative assessment processes now regularly include iwi from the start and stakeholders (and sometimes community representatives) at assessment workshops. This ensures a full range of ideas is canvassed and that robust discussion and assessment occurs.

### BUSINESS CASE REQUIREMENTS

The Treasury Better Business Case (BBC) process is intended to provide a systematic way for a project team, partners, and stakeholders to think and work together to give decision-makers the information they need to invest confidently. One purpose of BBC is to demonstrate that a proposed investment is strategically aligned, represents value for money, and is achievable (**Better Business Cases™ (BBC) (treasury.govt.nz)**).

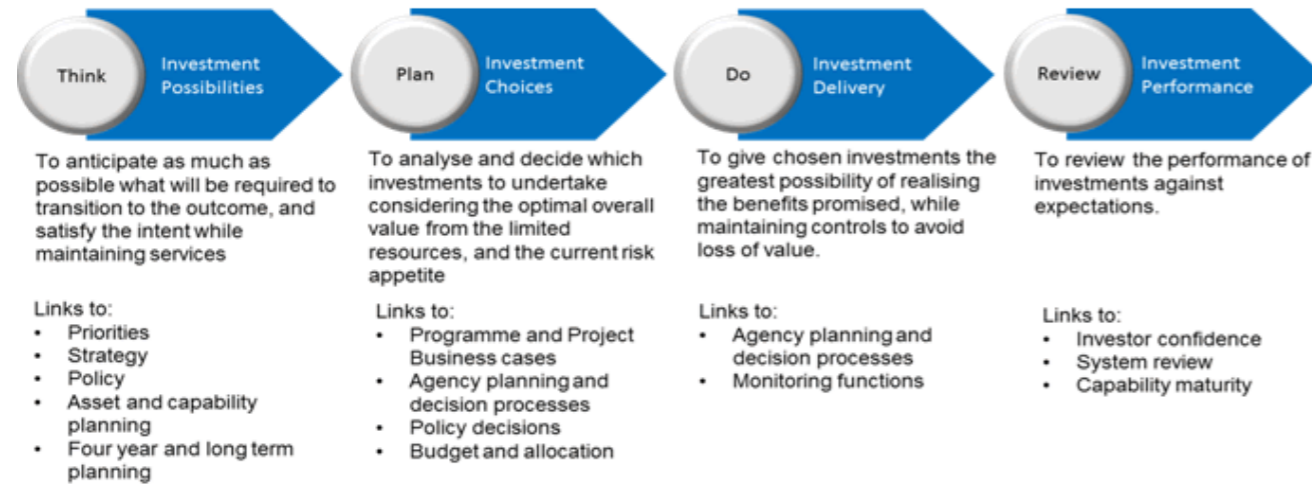
A business case, and therefore an alternatives assessment, is required for all significant investment proposals from state sector agencies. That is any proposal with a high degree of importance, high degree of risk, new funding, or whole-of-life costs over \$15 million.



The business case process fits within the Government's investment life cycle, providing the mechanism through which the idea generated in the "think" phase is turned

into an approved "plan" for delivery in the "do" phase (see Figure 1 below).

Figure 1: The Government investment life cycle (Source: Treasury website)



Waka Kotahi, although not strictly subject to Treasury processes, also requires business cases for all investment from the National Land Transport Fund (NLTF), which can be accessed by councils, Waka Kotahi and other approved organisations. Waka Kotahi promotes principles and behaviours that should be applied to business cases, including:

- starting with the problem or opportunity, rather than beginning with a solution;
- thinking critically, gathering evidence and consulting with iwi and stakeholders early in the process;

- linking the outcomes sought to government priorities and strategies; and
- ensuring the level of effort is proportionate to the complexity and risk of the problem and the proposed investment.

The broad steps in the business case process are set out in Figure 2, and while the specific steps will vary, all business cases should involve some alternatives assessment. Investment objectives form the core assessment criteria for alternatives; however other criteria are also often included.



Optioneering overview (nzta.govt.nz) focuses on determining:

- whether an alternative has strategic alignment with transport system outcomes (including the Government Policy Statement on Land Transport (GPS)), strategies, plans and policies;
- whether an alternative will deliver positive net benefits, i.e., benefits greater than costs;
- the relative environmental, social and cultural effects of alternatives; and
- whether an option can be implemented, e.g., is it constructable, consentable and can property rights be obtained, etc.

DISCUSSION

There are several similarities in the drivers and principles applying to alternatives assessment under the RMA and the business case process. Both seek to ensure a robust, systematic and transparent assessment. Both also seek that the assessment is well documented yet proportional to the issue at hand. Engagement with tangata whenua and stakeholders is also essential under both processes to ensure that problems are well understood, a comprehensive range of options are identified, and that the assessment is informed by a breadth of knowledge and perspectives.

However, some drivers could result in an alternatives assessment not being fit for purpose under both processes. A critical risk relates to the focus of the criteria against which the alternatives should be assessed. To satisfy requirements under the RMA, the criteria should:

- focus on the key resource management issues relevant to the proposal, i.e., environmental, cultural and social issues;
- pay particular attention to relevant pt 2 matters; and
- integrate those values that are "protected" by resource management policy statement and plan provisions.

In contrast, the BBC process highlights the importance of the investment objectives as key criteria, particularly in the initial business case phases. While it is not inevitable that these different drivers will result in different assessment criteria, they will only likely align if a specific effort is made to do so. Failure to do so may result in an alternatives assessment that is not fit for purpose under either the business case process or the RMA.

To reduce this risk, when an alternatives assessment is being driven from a business case perspective, it is recommended that those designing the process:

- Integrate consideration of key RMA directions right from the start (including iwi and stakeholder engagement).
- Consider appropriate alignment of RMA and investment objectives.

- Consider how the Business Case reads when applied to an RMA process, including potential litigation.
- Allow for return loops and be open to re-visiting earlier steps, particularly where it is not practical to integrate detailed RMA provisions early. For example, provide scope to check a draft shortlist against resource management provisions before it is finalised and repeat this exercise before confirming the preferred option.
- Consider whether it is relevant to stage the assessment of alternatives to align with any applicable and strongly-worded resource management policy and planning provisions.

When the alternatives assessment is driven from an RMA perspective, some principles that should be taken from the business case process include ensuring that:

- The problem is clearly defined and verified through evidence at the outset of the work, and use this alongside key resource management values to focus the alternatives assessment process.
- Careful consideration is given to the appropriate alignment of RMA and investment objectives.
- The problem definition is integrated throughout all stages of the assessment process.
- The financial implications of options are compared, and consideration is given to whether options are implementable.

**CONCLUSION**

There are several similar drivers for alternatives assessment under the RMA and business case process. However, there is a real risk that requires ongoing and careful management that an alternatives assessment driven too strongly by one process may not be fit for purpose under the other. Key steps that can reduce this risk are by:

- Involving tangata whenua and key stakeholders early in the process, ideally from the outset.
- Defining the problem at the start and integrating this throughout the process.
- Considering the appropriate alignment of RMA and investment objectives.
- Ensuring that environmental, cultural and social values inform the assessment, and where there is strong resource management policy direction on significant values ensure that it is given prominence in the process.
- Being mindful of the requirements of the end decision making process (and that for the RMA process it will be assessed by an external decision-maker).
- Considering how the process works in both the Business Case and RMA environments.
- Carefully recording and documenting the processes undertaken, options considered and the rationale for selecting a preferred option.



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